

**Office of Resolution Management (ORM)**  
**Policy / Guidance for**  
**Release of Information from EEO Files**

**Overview**

ORM's primary responsibility is for the processing of VA employee discrimination complaints. Thus this policy will focus on responding to requests for information from EEO complaint files. In administering Freedom of Information Act (FOIA) procedural requirements, ORM should do "everything possible to promote openness in Government and to respond to requests for information in a customer friendly manner.

The Freedom of Information Act (FOIA), enacted in 1966, generally provides that any person has a right of access to federal agency records. This right of access is enforceable in court except for those records that are protected from disclosure by the nine exemptions to the FOIA. The FOIA provides access to all federal agency records (or portions of those records) except those that are protected from release. There are nine exemptions to the release of information under FOIA. The exemptions cover such material as (1) classified national defense and foreign relations information, (2) internal agency personnel rules and practices, (3) material prohibited from disclosure by another law, (4) trade secrets and other confidential business information, (5) certain inter-agency or intra-agency communications, (6) personnel, medical, and other files involving personal privacy, (7) certain records compiled for law enforcement purposes, (8) matters relating to the supervision of financial institutions, and (9) geological information on oil wells.

Copies of the FOIA and Privacy Acts, as well as other relevant information can be found on the Department of Justice Website [www.usdoj.gov/oip](http://www.usdoj.gov/oip).

Responses to FOIA requests must be provided within **20** working days of the date of receipt. (Previously, a response was required within 10 days, but the Electronic Freedom of Information Act Amendments of 1996 increased it to twenty). An interim response must be sent to the requester within the 20 day timeframe if full disclosure is not possible due to delays in retrieving or reviewing the requested information.

The Privacy Act, 5 U.S.C. 552a, applies to any records about an individual which are retrieved by that individual's name or personal identifier (such as Social Security or C-File number). **The Privacy Act prohibits disclosure of any records about an individual, which are retrieved by that individual's name or personal identifier without that individual's prior written consent, unless disclosure is specifically authorized by the Act.**

Requests for information under the Privacy Act must also be responded to within **20** days of the date of receipt by the office that maintains the requested information. An interim response must be sent to the requester within the 20 day timeframe if full disclosure is not possible due to delays in retrieving or reviewing the requested information.

VA General Counsel (GC) has issued a memorandum entitled, [Request for Legal Opinion](#) on Releasing Information from EEO files (VAOPGC ADV 5-99). This memorandum is dated March 26, 1999. It outlines the extent to which ORM employees are authorized to release information from EEO complaint files to VA management, responsible management officials (RMOs), complainants, and VA attorneys. It also clarifies when ORM must provide an EEO complainant with a copy of the investigation file when VA and the complainant have entered into a settlement agreement during the investigation of a complaint. We have borrowed heavily from the GC document in fashioning this policy and encourage its use as a point of reference when making decisions about release of information from EEO files. A copy of the GC memorandum is attached.

All records from which information is retrieved by the name or personal identifier of an individual must be maintained in what is called “a Privacy Act system of records,” published in the Federal Register. The office of Resolution Management (ORM) maintains one system of records: EEOC/GOVT-1. When an employee or applicant contacts an EEO counselor, or files a complaint, any resulting information or documents are placed in a system of records belonging to the Equal Employment Opportunity Commission (EEOC), but located at the agency where the complaint was filed. According to the system of records notice, these files contain information or documents compiled during the precomplaint counseling and the investigation of complaints. In VA, such files are generally maintained at the ORM field office where the complaint was filed. ORM Field Managers whose office has jurisdiction over the complaint and has custody of the records will determine whether or not to release these complaint records in accordance with any instructions from the EEOC and consistent with the Privacy Act. ORM Field Managers are designated FOIA officers for their facilities.

In addition to the EEOC system of records, VA maintains over eighty other systems of records. ORM personnel will encounter some of these systems when performing their duties. Some examples are Patient Medical Records (24VA136); General Personnel Records (Title 38) – VA (76VA05); General Personnel Records (Title 5) (OPM/GOVT-1); and Veteran, Employee and Citizen Health Care Facility Investigation Records – VA (32VA00).

As indicated, the Privacy Act prohibits disclosure of records from the EEOC system of records (or disclosure of information from these records) without the complainant's prior written consent, unless an exception applies. Under the “need to know” exception records may be disclosed to another VA employee

without prior written consent if the employee has a need for that record (or information from a record) in performing his or her official duties. The Privacy act provides that such records may be disclosed “to those officers and employees of the agency, which maintains the record, who have a need for the record in the performance of their duties.”

Field Managers serve as the Freedom of Information Act (FOIA) officers for their respective offices by delegation. Tyrone Eddins, External Affairs Manager, is the Freedom of Information (FOIA) Act officer for ORM. He will provide guidance and assistance to Field Managers on FOIA issues. Requests for access to EEO records should be processed by the ORM field office having the records in question. Field Managers and their designees should adhere to the following guidelines when responding to requests for release of information from EEO complaint files:

Before releasing records to VA employees Field Managers should ensure that disclosures are commensurate with the need to know and limited to only that amount of information necessary to assist an employee in the performance of the duties requiring disclosure. Field Offices should track and document responses to FOIA requests to ensure timely responses. An on-line FOIA/Privacy Act tracking system has been developed for use within ORM. This tracking system should be used to track the receipt of and responses to FOIA requests.

The following guidelines provide an overview of the document disclosure process that should be followed throughout the complaint investigation process:

### **The Pre-complaint Counseling Stage**

The pre-complaint counseling stage includes all counseling efforts up to, but not including, the filing of a complaint and preparation of the written Counselor's report. The relevant documents at this stage are the Counselor's notes, and documents gathered by the Counselor or provided by the complainant. The persons likely to request these materials are the complainant (or representative), RMOs, and facility management.

#### **Disclosure to the Complainant**

The complainant has no access right to the records under the Privacy Act, and therefore, cannot compel the agency to release copies of records from the file at this stage of the proceedings. There is no regulatory entitlement to these documents at this stage either. Under EEOC's regulatory scheme, in the final interview, the counselor orally explains what information was obtained in the pre-complaint counseling, so the complainant can decide whether to go forward with a formal complaint. In exempting the EEOC system of records, the EEOC has decided that complainants do not require copies of the documents gathered or the Counselor's notes in order to make that decision. They should have received sufficient oral information in the final interview. Thus, the only

disclosure required is that oral information communicated by the counselor in the final interview.

#### Disclosure to the RMO

The purpose of the complaint process is first to evaluate the validity of an employment discrimination allegation, and, where valid, provide relief at the most informal level possible. At the counseling stage, the RMO simply needs notice of, and opportunity to respond to, the allegations raised by the complaint. The RMO is merely, a witness who has no independent “need to know” what is contained in the subject documents.

Under the “need to know” exception, the counselor is authorized to disclose a limited amount of information from the file to the RMO to gain information about what happened, or to hear the RMO’s side of the events at issue. However, this exception is not generally broad enough to include a wholesale disclosure of notes and documents. Furthermore, if ORM counselors determine that it is necessary to disclose some additional information to an RMO in order to informally resolve the case, they may do so. Any request from an RMO (without the complainant’s prior written consent) before an investigation has begun should be denied as barred by the Privacy Act.

#### Disclosure to Management

Disclosure should be guided by the reason the information is sought, balanced against the constraints identified above, i.e., the need to maintain the perception and reality of a complaint resolution system which is fair and independent of management. The needs often asserted by management are, first, to consider settlement of issues raised; second, to know what has transpired at the facility; and third, to conduct any necessary disciplinary action. As to the first need, both the EEOC and VA have strong policies in favor of resolving these cases at the earliest possible stage. In order to do so, management clearly must understand the issues and what has transpired, in order to evaluate whether settlement is appropriate. ORM employees could disclose the issues and bases raised by the complainant during the informal counseling. If management seeks disclosure of any other information in the file, the need to know would have to be compelling before disclosure would be authorized. As to the general need to be informed about what is going on at a facility, ordinarily only general information, sufficient for management to undertake their own detailed inquiry, would seem to be authorized. With regard to management’s need for the file for purposes of discipline, it would almost always be premature to disclose information or documents from the file at this point in the complaint process for that purpose. It should be noted that if the manager making the request is also the RMO, the request should be denied. Such a request should be made from management at a level above that of the RMO.

## **After a Formal Complaint is Filed** **Request is Made Before the Completion of the Investigation**

### **Disclosure to the Complainant**

The complainant does not have a right under the Privacy Act to the counseling stage records. However, EEOC regulations (29 C.F.R. Part 1614) provide that once a formal complaint is filed, the Counselor must draft a report and submit it to the applicable ORM field office and the aggrieved person. See 29 C.F.R. 1614.105(c).

Further, the EEOC Management Directive, EEO M-110, provides that the Counselor must submit the report to the *complainant within 15 days* after notification by the EEO officer or other appropriate officials that a formal complaint has been filed.

### **Disclosure to the RMO**

From the formal complaint filing until the EEO investigator contacts the RMO as a witness, RMOs do not generally have a need to know which would justify any disclosures. The counselor has presumably made the RMO aware of the allegations during the counseling period. The investigator may disclose information from the file to the RMO in order to uncover more facts, but there is no need that would justify a broad release of all the documents in the file by the investigator, or pursuant to the request of the RMO.

### **Disclosure to Management**

ORM employees must assess the reason for the request. For example, if the request demonstrates a need to know for purposes of assessing settlement potential, release is authorized to the extent it is consistent with that purpose. ORM employees would accordingly be authorized to disclose the content of the relevant portions of the Counselor's Report to management pursuant to the "need to know" exemption. If the request is premised on the more general interest in what is happening within the organization, the disclosure may be more limited, or possibly denied. As at the pre-complaint counseling stage, almost all requests for information for disciplinary purposes would be premature, and thus could not be honored at that time, under the Privacy Act.

## **Request is Made After the Completion of the Investigation**

### **Disclosure to the Complainant**

ORM employees must provide the complainant a complete copy of the investigative file upon completion of the investigation, consistent with 29 CFR, Sec. 1614. This includes the pre-complaint documents, the formal complaint, the acceptability determination, the appointment of the investigator, sworn statements, and any other documentary evidence compiled.

### **Disclosure to the RMO**

ORM employees may provide the RMO a copy of his own affidavit.

When the complainant does not request a hearing. The RMO does not need to know any more information, since the RMO has no role in the only remaining element of the process, i.e. Department decision on the matter. Any request from an RMO at this stage will be denied as barred by the Privacy Act.

When the complainant requests a hearing. If the complainant asks for a hearing, the RMO must appear as a witness. Generally the agency representative represents VA and the RMO. Representatives are usually Regional Counsel or General Counsel employees, or Human Resources employees. The agency representative must have a copy of the entire file. The RMO has no independent "need to know" for the file. ORM should deny an RMO request under the Privacy Act.

Disclosure to Management. Management's "need to know" will vary depending on whether a hearing has been requested.

When the complainant does not request a hearing. Management requests for a copy of the investigator's report should be granted at this stage, since it contains a summary of the evidence. It will satisfy the need for information by management to determine appropriateness of settlement.

When the complainant requests a hearing. Management has a clear need to know the contents of the entire file in order to consider settlement and to prepare for the hearing. Thus a copy should be provided. This may often be accomplished by disclosure to the agency representative.

### **Request is Made After a Final Agency Decision is Issued**

Disclosure to the Complainant. The complainant should have already received a complete copy of the file after the investigation had been completed. The Administrative Judge makes the hearing transcript available, and the Office of Employment Discrimination Complaint Adjudication sends a copy of the decision to the complainant.

Disclosure to the RMO. If an RMO request is made after an OEDCA decision, the request may be denied unless discipline has been proposed. If discipline is being considered, the RMO should have all pertinent information in order to ensure that the Department properly considers all points of view. All portions of the file that reasonably relate to the disciplinary charges should be disclosed pursuant to the need to know exception.

Disclosure to Management. If discrimination has been found, management must consider whether discipline should be taken against the RMO, and whether other

preventative measures need to be undertaken. That portion of the file needed for disciplinary purposes should be made available. If preventative measures are indicated, more information may be disclosed under the need to know exception. If there is no finding of discrimination, the decision alone would ordinarily be sufficient to met management needs.

As mentioned earlier in this document, this policy statement is intended to give guidance to ORM personnel for handling FOIA/Privacy Act requests as they relate to EEO records. Reference should be made to the GC document and the "Freedom of Information Act Guide & Privacy Act Overview", May 2000 edition which give discussion in further detail concerning disclosure of records.